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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 1103

HERBERT CALLENDER,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS OR AFFIRM

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In its Motion to Dismiss or Affirm[1] (at page 7 *et seq.*), Appellee contends that unlike the "generalized" breach of the peace statutes condemned by this Court in *Edwards* v. *South Carolina,* 372 U. S. 229, 237 (1963) and *Cox* v. *Louisiana,* 379 U. S. 536 (1965), Section 722 of the Penal Law of New York is narrowly limited to define and punish specific conduct. But such a position misses the burden of our argument; for an act to be punishable under any of the subdivisions of Section 722 there must first be proved that the act provoked or tended to provoke a "breach of the peace", a phrase frequently defined by this Court. Cf. *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). But even Appellee's summary of the evidence fails to establish any circumstances indicative of a breach of the peace. Even more than in *Cox, supra,* the police were in complete con-

[1] Hereinafter referred to as "Motion".

trol of the situation at all times. Nothing said or done by Appellant or his one *bona fide* companion[2] in any way threatened a breach of the peace. All that was proven was that Callender sought the assistance of the police and it was denied him.

Appellant stood in a corridor and spoke to two police officers to solicit their aid (motion p. 4; Record p. 19). This was the full extent of his "conduct". Other people, including news media personnel and others neutral to Callender's efforts, were present before Callender arrived and were not asked to move. Appellant differed from them only in that he spoke and the police did not like what he said. Appellee's gratuitous and improper reference to a physical attack (motion p. 9) is totally without foundation. Appellant was engaged in "pure" speech fully protected by the First Amendment, seeking to redress what he conceived of as a grievous wrong. Even if remaining to continue to solicit assistance is "conduct", it was nonetheless protected activity. He had a right to be where he was, the building was open, and he behaved in a seemly manner. The police had no right to arrest him for failing to move on. He was committing no trespass.

In light of the facts in this case, the contention that the statute as interpreted by the Courts below is a narrowly drawn exercise of police power becomes untenable. Indeed subdivision 2 which punishes persons who act " . . . in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others . . . " encompasses a broad variety of constitutionally protected conduct. Language, such as

[2] As was known to Appellee, one of Appellant's two companions was a police officer acting in an undercover capacity.

that of Appellant, which merely "annoys" others has consistently been protected by this Court as have words which "invite dispute", *Cox* v. *Louisiana, supra; Edwards* v. *South Carolina, supra; Terminello* v. *Chicago,* 337 U. S. 1 (1949); *Cantwell* v. *Connecticut, supra.*

Similarly, subdivision 3, as interpreted below, which punishes one who congregates with others on a public street and refuses to move on when ordered to do so by the police "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat". *Cox* v. *Louisiana, supra* at 559; *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965). Absent the showing of a "clear and present danger", absent any conduct which invites a breach of the peace, as in *Feiner* v. *New York,* 340 U. S. 315 (1951), subdivision 3, as interpreted by the courts of New York, can not be constitutionally applied.

In our view the instant case affords the Court an opportunity to determine these significant issues.

Respectfully submitted,

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